Clements Wire & Manufacturing Company, Inc. *and* **International Union of Electrical, Radio and Machine Workers, AFL-CIO-CLC and its Local 779.** Cases 15-CA-6941, 15-CA-6941-2, and 15-CA-6941-3

August 28, 1981

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

On February 8, 1980, Administrative Law Judge J. Pargen Robertson issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions[1] and a supporting brief, the General Counsel and the Charging Party filed exceptions and supporting briefs with respect to the remedy, and the General Counsel and Respondent filed answering briefs.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge as modified below.

1. We agree with the Administrative Law Judge's conclusion that Respondent violated Section 8(a)(5) and (1) of the Act by, *inter alia*, unilaterally changing employees' insurance benefits, requesting volunteers for a 1-day layoff, and expanding its production facility. With respect to insurance benefits, it is undisputed that Respondent changed its health and life insurance carrier and increased benefits by adding maternity benefits for its employees. Although Respondent contends that the change in benefits was made due to its belief that such benefits were required by government regulations, it offered no evidence to support this contention. Accordingly, we find that this unilateral change in employee benefits violated Section 8(a)(5) and (1).[2]

It is also undisputed that on March 25, 1979, Respondent asked its employees if anyone wanted to take a day off without pay. Respondent's plant manager, Gary Carmichael, testified that it was necessary to operate with less than a full employee complement on that day, since representatives from Ford Motor Company were visiting and Respondent wanted to show Ford that its facility was not operating at capacity and could handle additional work. Carmichael further testified that a substantial number of employees "volunteered" and that 25 employees received a day off without pay.

In effect, the above incident constituted a 1-day layoff of a substantial number of employees without notice to or bargaining with the Union. Respondent offers no evidence that "compelling economic considerations" precipitated this layoff. Moreover, the record reveals that Respondent deviated from its past practice regarding layoffs, which until that time had been based essentially on seniority and had not entailed requests for volunteers. In so doing while objections to the election were pending, Respondent acted at its peril in failing to notify the Union of its decision to lay off employees and to consult with the Union concerning the layoffs. Since the final determination in the representation proceeding resulted in certification of the Union, Respondent violated Section 8(a)(5) and (1) of the Act.[3]

We also agree with the Administrative Law Judge's finding that Respondent's expansion of its operation pending a final determination in the representation proceeding, without notice to or consultation with the Union, violated Section 8(a)(5) and (1) of the Act. Plant Manager Carmichael testified that this decision entailed moving the cutting department from the air-conditioned production area to a non-air-conditioned warehouse, utilization of new machinery and the transfer of some employees to operate it, and the hiring of new employees. In our opinion, the above evidence supports the conclusion that this expansion represents a substantial and significant change in the terms and conditions of employment in the bargaining unit, and by unilaterally so doing Respondent violated Section 8(a)(5) and (1).

The record, however, does not support the Administrative Law Judge's finding that Respondent's posting of two job notices constituted a unilateral change in violation of Section 8(a)(5) and (1). The evidence introduced concerning this allegation indicates that sometime in February 1978 Respondent posted notices announcing openings for the positions of material handler in the shipping department and "night inspectress." At least one of the two notices had a place for employees to sign up if

[1] Respondent in the alternative requests that the Board reopen the record. This request is hereby denied as it is without merit.

[2] See, e.g., *Keystone Steel & Wire, Division of Keystone Consolidated Industries, Inc.*, 237 NLRB 763 (1978), enforcement denied in part 606 F.2d 181 (7th Cir. 1978), Supplemental Decision 248 NLRB 283 (1980), enfd. 107 LRRM 3143 (1981); *Bastian-Blessing, Division of Golconda Corporation*, 194 NLRB 609 (1971), enfd. 474 F.2d 48 (6th Cir. 1973). Since we agree with the Administrative Law Judge that it would be inappropriate to require restoration of the status quo with respect to the carrier of its employees' insurance, we need not consider whether the change in identity of the carrier itself constituted a unilateral change in the employees' terms and conditions of employment.

[3] *Mike O'Connor Chevrolet-Buick-GMC Co., Inc., and Pat O'Connor Chevrolet-Buick-GMC Co., Inc.*, 209 NLRB 701, 703 (1974).

they were interested in the job. Plant Manager Carmichael testified that prior to that time Respondent did not post notices of job vacancies, but rather would ask individual employees whom it felt capable of handling the job whether they were interested in it. There is no indication in the record as to the manner in which these positions were ultimately filled. Thus, it is unknown whether, for example, employees were required to sign up in order to be considered for these positions or, for that matter, whether Respondent continued its past practice of contacting individuals and asking if they were interested in the job opening. Under these circumstances, the evidence is insufficient to warrant a finding that the mere posting of job openings, without more, represents "a material, substantial change from prior practice."[4] Accordingly, such posting does not constitute a unilateral change in violation of Section 8(a)(5) and (1) of the Act and we so find.

2. The Administrative Law Judge further found that Respondent violated Section 8(a)(5) and (1) of the Act by laying off employees on several occasions prior to certification of the Union, without notice to or bargaining with the Union. We agree with this conclusion. Although an employer may properly decide that an economic layoff is required,[5] once such a decision is made the employer must nevertheless notify the Union, and, upon request, bargain with it concerning the layoffs, including the manner in which the layoffs and any recalls are to be effected.[6] By failing to so notify the Union while its objections to the election were pending, Respondent acted at its peril and, since the Union was thereafter certified as the collective-bargaining representative of its employees, Respondent thereby violated Section 8(a)(5) and (1) of the Act.[7]

We find merit, however, in the General Counsel's and the Charging Party's contention that the Administrative Law Judge erred in failing to recommend any backpay remedy for those employees laid off as a result of Respondent's unilateral action. In so doing, the Administrative Law Judge found that, since the evidence failed to "demonstrate that the layoffs could have been avoided or mitigated through bargaining," an award of backpay was not warranted. However, the Board has in the appropriate circumstances provided a make-whole remedy to employees laid off or terminated without notice to or bargaining with the union in violation of Section 8(a)(5) and (1) of the Act.[8] In our view, Respondent's refusal to bargain can only be remedied by restoration of the *status quo ante*, which must necessarily include backpay for those employees laid off in violation of the Act. Accordingly, we shall modify the Administrative Law Judge's recommended Order to so provide.

Finally, we agree with the Administrative Law Judge that Respondent violated Section 8(a)(5) and (1) by unilaterally changing its production rate system with respect to an undetermined number of employees and by changing its work rules. To remedy these violations, he recommended that Respondent be required to reinstate and make whole those employees who were disciplined as a result of these unilateral changes.[9] However, in his recommended Order, the Administrative Law Judge failed to require Respondent to expunge from its records all reference to any disciplinary action taken as a result of the unilateral changes in production rates and work rules and to so notify the affected employees in writing. Since the Board customarily provides such a remedy in similar circumstances, we shall include this requirement in our Order.

AMENDED REMEDY

Having found that Respondent violated Section 8(a)(5) and (1) by laying off employees without notice to and bargaining with the Union, we shall order Respondent upon request to bargain with the Union concerning the layoffs of employees between October 21, 1977, and June 29, 1979. We shall further order that Respondent make whole those employees laid off by Respondent during the aforementioned period for any loss of pay suffered by reason of Respondent's unlawful conduct. Backpay shall be computed in the manner set forth in *F. W. Woolworth Company*,[10] with interest thereon computed in the manner set forth in *Florida Steel Corporation*.[11]

Having found that Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally changing

[4] See, e.g., *Rust Craft Broadcasting of New York, Inc.*, 225 NLRB 327 (1976).

[5] See, e.g., *Southern Coach & Body Company Inc.*, 141 NLRB 80 (1936), enforcement denied 336 F.2d 214 (5th Cir. 1964).

[6] See, e.g., *Keystone Casing Supply, Inc.*, 196 NLRB 920 (1972); see also *The Lange Company, a Division of Garcia Corporation*, 222 NLRB 558 (1976).

[7] *Sundstrand Heat Transfer, Inc. (Triangle Division)*, 221 NLRB 544 (1975), enforcement denied in part 538 F.2d 1257 (7th Cir. 1976).

[8] See, e.g., *Cloverleaf Cold Storage Co.*, 160 NLRB 1484 (1966); *M & H Machine Co., Inc.*, 243 NLRB 817 (1979); Santee River Wool Combing Company, Inc., 221 NLRB 129 (1975). See also *Smyth Manufacturing Company, Inc.*, 247 NLRB 1139 (1980); *The Shaw College at Detroit, Inc.*, 232 NLRB 191 (1977); *Sundstrand Heat Transfer, Inc., (Triangle Division), supra*.

[9] We also agree with the Administrative Law Judge's finding that at least one employee, Christine Lamas, was in fact discharged as a result of these unilateral changes. We leave to compliance the determination as to whether any other employees were so disciplined.

[10] 90 NLRB 289 (1950).

[11] 231 NLRB 615 (1977). See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

production rates and work rules without notice to and bargaining with the Union, we shall order Respondent to cease and desist therefrom and take certain affirmative steps in accordance with the recommended Order of the Administrative Law Judge. We shall further order that Respondent expunge from its records any and all reference to disciplinary actions resulting from the aforementioned unilateral changes and that Respondent advise, in writing, the affected employees that such disciplinary action has been rescinded and their records expunged.[12]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Clements Wire & Manufacturing Company, Inc., Biloxi, Mississippi, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Unilaterally laying off employees, requesting that employees take time off without pay, transferring employees and hiring new employees because of plant expansion, changing production rates, instituting a new employee handbook, and changing employees' insurance coverage to the extent those changes affect employees in the below-described bargaining unit, without notice to or consultation with the Union as the exclusive representative of all its employees in the below-described appropriate bargaining unit prior to making such changes.

(b) Refusing to bargain with International Union of Electrical, Radio and Machine Workers, AFL-CIO-CLC and its Local 779, as the exclusive bargaining representative of its employees in the unit described below, by laying off employees, requesting that employees take time off without pay, transferring unit employees and hiring new employees due to plant expansion, changing production rates, instituting a new employee handbook, and changing insurance coverage on its unit employees without notice to, or consultation with, the said labor organization.

(c) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights to self-organization, to form, join, or assist the above-named labor organization, or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection as guaranteed by Section 7 of the Act, or to refrain from any or all such activities.

2. Take the following affirmative action designed to effectuate the policies of the Act:

(a) At the request of International Union of Electrical, Radio and Machine Workers, AFL-CIO-CLC and its Local 779, revoke any and all of the actual production rates implemented on jobs in the below-described bargaining unit at any time during the period from October 21, 1977, to June 29, 1979; revoke its employee handbook which was distributed to employees on or about March 26, 1979; restore the estimated production rates which were in effect before the aforementioned actual rates were instituted; and restore procedure and policy regarding employee rules which were in effect before institution of the employee handbook mentioned above.

(b) Upon request bargain collectively and in good faith with International Union of Electrical, Radio and Machine Workers, AFL-CIO-CLC and its Local 779, as the exclusive representative of its employees in the below-described bargaining unit concerning the layoffs effected between October 21, 1977, and June 29, 1979. The appropriate unit is:

> All production and maintenance employees employed by Respondent at its Biloxi, Mississippi, facility, including material handlers, maintenance employees, floor inspectors, plant clerical employees and warehouse employees; excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act.

(c) Rescind all disciplinary actions taken against any of its employees in the above-described bargaining unit which resulted from its institution of the employee handbook during March 1979, or from the disciplined employees' failure to maintain production pursuant to *actual* production rates established during the October 21, 1977, through June 29, 1979, period, and expunge from its records all memoranda of or reference thereto.

(d) Advise the affected employees, in writing, that all such disciplinary action has been rescinded and their records have been expunged.

(e) Offer to all employees laid off, suspended, or terminated because of its March 1979 institution of the employees' handbook or its institution of *actual* production rates, immediate, full, and unconditional

[12] The Charging Party Union contends that, in view of Respondent's "flagrant violations of the Act," the Administrative Law Judge erred in failing to recommend that Respondent be required to mail individual notices to all its employees, grant union access to its bulletin board, provide the Union with a list of employees and their addresses, and pay the Charging Party's litigation expenses. We find this contention to be without merit. We do not believe that the 8(a)(5) violations found herein rise to the level of "clear and flagrant violations of law." *Tiidee Products, Inc.*, 194 NLRB 1234 (1972). Nor do we find "patently frivolous" the defenses raised by Respondent in this case. See, e.g., *Winn-Dixie Stores, Inc.*, 224 NLRB 1418 (1976).

reinstatement to their former positions or, if such positions no longer exist, to substantially equivalent positions, without prejudice to seniority or other rights and privileges previously enjoyed, and make each such employee whole for any loss of pay that employee may have suffered by reason of its illegal actions, with interest.

(f) Make whole those employees laid off between October 21, 1977, and June 29, 1979, for any loss of pay suffered as a result of this unlawful conduct in the manner set forth in that portion of the Board's Decision entitled "Amended Remedy."

(g) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(h) Post at its Biloxi, Mississippi, facility copies of the attached notice marked "Appendix."[13] Copies of said notice, on forms provided by the Regional Director for Region 15, after being duly signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(i) Notify the Regional Director for Region 15, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

[13] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT unilaterally lay off employees, request that employees take time off without pay, transfer employees and hire new employees because of plant expansion, change production rates, institute a new employee handbook, and change insurance coverage, in the following bargaining unit which is represented for the purpose of collective bargaining by International Union of Electrical, Radio and Machine Workers, AFL-CIO-CLC and its Local 779:

> All production and maintenance employees employed by Clements Wire & Manufacturing Company, Inc., at its Biloxi, Mississippi, facility, including material handlers, maintenance employees, floor inspectors, plant clerical employees and warehouse employees; excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act.

WE WILL NOT refuse to bargain with International Union of Electrical, Radio and Machine Workers, AFL-CIO-CLC and its Local 779, as the exclusive bargaining representative in the above-described bargaining unit by unilaterally changing wages, hours, or working conditions of employees in the bargaining unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their right to self-organization, to form, join, or assist any labor organization, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any and all such activities.

WE WILL, if requested by the Union, revoke the actual production rates implemented on jobs within the above-described bargaining unit between October 21, 1977, and June 29, 1979; revoke our March 1979 employees' handbook; restore the estimated production rates which were in effect before we implemented the above-mentioned actual rates; and restore the policy and practice which was in effect before we issued the employees' handbook.

WE WILL, upon request, bargain collectively and in good faith with International Union of Electrical, Radio and Machine Workers, AFL-CIO-CLC and its Local 779, as the exclusive representative of our employees in the above-described unit concerning the layoffs effected between October 21, 1977, and June 29, 1979.

WE WILL rescind all disciplinary action taken against any of our employees in the above-described bargaining unit, where that disciplinary action resulted from our institution of an employees' handbook during March 1979, or our institution of *actual* production rates during the period beginning on October 21, 1977, and ending on June 29, 1979, and WE

WILL expunge from our records all memorandums of or reference thereto.

WE WILL notify affected employees, in writing, that all such disciplinary action has been rescinded and their records expunged.

WE WILL offer immediate, full, and unconditional reinstatement to all employees in the above-described bargaining unit who were suspended, laid off, or terminated because of our March 1979 handbook or our October 21, 1977, to June 29, 1979, change from estimated actual production rates, to their former jobs or, if such jobs no longer exist, to substantially equivalent positions, without prejudice to seniority or other rights and privileges previously enjoyed; and WE WILL make each such employee whole for any loss of pay that employee may have suffered by reason of our illegal action in refusing to bargain with the Union, with interest.

WE WILL make whole those employees laid off between October 21, 1977, and June 29, 1979, for any loss of pay suffered as a result of our unlawful conduct, with interest.

CLEMENTS WIRE & MANUFACTURING COMPANY, INC.

DECISION

STATEMENT OF THE CASE

J. PARGEN ROBERTSON, Administrative Law Judge: This case was heard in Biloxi, Mississippi, on September 25 and 26, 1979. The charges in Cases 15-CA-6941, 15-CA-6941-2, and 15-CA-6941-3 were filed on June 16, 1978, March 14, 1979, and June 15, 1979. A consolidated complaint issued in Cases 15-CA-6941 and 15-CA-6941-2 on July 3, 1979. A complaint issued in Case 15-CA-6941-3 on July 24, 1979, and an order issued consolidating all three cases on July 24, 1979. The complaints were amended during the hearing. The complaints, as amended, allege that Respondent violated Section 8(a)(1) and (5) of the National Labor Relations Act (Act), by making unilateral changes in working conditions at various times after October 21, 1977.

Upon the entire record,[1] from my observations of the witnesses, and after due consideration of briefs filed by Respondent and the General Counsel, I hereby make the following:

[1] In its brief Respondent attached several exhibits from a hearing involving it before Administrative Law Judge James T. Youngblood (Case 15-CA-6602-2, et al.), and asked that I consider the exhibits. I hereby grant Respondent's motion in that regard.

FINDINGS OF FACT

I. THE EVIDENCE

Respondent is involved in the manufacture of automotive wire harnesses at its Biloxi, Mississippi, location.[2] Practically all of Respondent's product is sold to Ford Motor Company. Respondent has employed as many as 250 employees during the past 2 years, but at the time of this hearing it employed approximately 85.

The General Counsel alleges that Respondent engaged in unilateral changes violative of Section 8(a)(5) during the postelection period. In large measure the allegations involve precertification conduct by Respondent.

Following the Charging Party's petition, an election was conducted by the Regional Director at Respondent's facility on October 21, 1977. A majority of the employees voting selected the Charging Party (hereinafter the Union) as their bargaining representative.[3] However, Respondent filed objections to the election and it was not until May 14, 1979, that the Union was finally certified as the employees' representative by the National Labor Relations Board.

The Union made one demand for bargaining before the election, on August 31, 1977. Thereafter, the Union requested that Respondent meet and bargain by letters dated March 20, 1978, and May 16, 1979. Respondent did not respond to those requests until June 29, 1979, when it agreed to meet and commence negotiations.

The General Counsel alleges that following the October 21, 1977, election Respondent unilaterally laid off employees, required 25 employees to take a day off without pay, instituted a job-bidding system by posting notices of employment positions available, moved unit employees and hired new employees because of plant expansion, changed production rates, and put into effect a new employee rule book. During the hearing, the General Counsel alleged that Respondent unilaterally changed the carrier of unit employees' insurance.

A. *The Layoffs*

The evidence is not in dispute that Respondent, on several occasions between October 21, 1977, and mid-June 1979, laid off unit employees without affording the Union an opportunity to bargain. Respondent's plant manager, Carmichael, testified without contradiction that all of the layoffs resulted from lack of work. Carmichael said the lack of work resulted from one of three reasons and that those three were the only reasons why Respondent laid off employees. Carmichael indicated that

[2] Neither jurisdiction nor the status of the Charging Party is at issue. The complaint alleges, the answer admits, and I find that Respondent meets the Board's standards for the assertion of jurisdiction and is an employer engaged in commerce within the meaning of Sec. 2(6) and (7) of the Act. Respondent also admits and I find that the Charging Party is a labor organization as defined in the Act.

[3] The Union was certified as collective-bargaining representative of the employees in the following unit:

> All production and maintenance employees employed by Respondent at its Biloxi, Mississippi, facility, including material handlers, maintenance employees, floor inspectors, plant clerical employees and warehouse employees; excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act.

on occasion a material shortage resulted in a number of employees not being able to conclude a scheduled run. On those occasions the effected employees were sent home if they had nothing to do. The second reason given was an unpredicted cutback in orders, usually from Respondent's principal customer, Ford Motor Company. The third reason was that Respondent's business is a seasonal one. Respondent has a 3- or 4-week seasonal lull whenever the automotive industry finishes one model year and begins the next model year which results in a shutdown at Respondent's assembly plant.

B. *The Day Off*

Plant Manager Carmichael admitted that, on one occasion during a visit to Respondent's plant by representatives of Ford Motor Company, Respondent asked its employees if any wanted to volunteer to take the day off without pay. Carmichael testified that the request was made because Respondent wanted to show Ford that they had the capability of handling additional business. Therefore it was important that they operate with up to 25 employees missing. Carmichael testified that approximately 25 volunteers were given the day off without pay.

C. *The Job-Bidding System*

The parties stipulated that during February 1978 Respondent posted notices for the positions of material handler and night inspectress and that one of the two notices had a place at the bottom for interested employees to sign.

D. *The Effects of Plant Expansion*

Plant Manager Carmichael testified that the production facility was expanded in April 1978. The procedure, which resulted in the April 1978 expansion, commenced in 1976. Carmichael testified that the expansion resulted in the hiring of new employees and the transfer of old employees. He testified that eight or nine employees were assigned, as a result of the plant expansion, to run a conveyor table that makes an oblong circle.

E. *The Changed Production Rates*

Although unit employees in production jobs are paid on a standard hourly rate without regard to production, those employees are possibly subject to discipline if they fail to maintain production at a 90-percent level. Plant Manager Carmichael testified that there are two types of production rates in the plant—estimated and actual. According to Carmichael there are approximately 1,000 to 1,500 different low skill jobs in production. Each of those jobs is assigned either an estimated or an actual production rate. The estimated rates are simply estimates of what production should be, while the actual rate is determined by a timestudy. Although all the production rates are contained in the computer, whether estimated or actual, employees are subject to discipline for low production only on those jobs that have been assigned an actual production rate. Carmichael testified that Respondent has, during the period since the October 21, 1977, election, been engaged in the process of assigning actual production rates to the various jobs. There was no showing that that process did not begin prior to the election. Carmichael estimated that, at the time of the hearing, approximately 25 to 30 percent of the 1,000 to 1,500 jobs had been assigned an actual rate.

F. *The New Employee Rule Book*

The evidence is not in dispute that on or around March 26, 1979, Respondent distributed an employee handbook to all its employees. Following March 26, new employees were given a copy of the handbook when they were hired. The handbook contains approximately 18 pages and has general information regarding work at Respondent's plant including a statement regarding the quality requirements, an explanation of the employee probationary period, statements regarding hours of work, timecards, payday, wages, payroll deductions, personnel records, insurance benefits, vacations, holidays, and work attendance requirements. Additionally, the handbook contains an explanation of which absences may be excused and a threat of penalty for absences which are not excused. The handbook explains that tardiness could result in discipline and that excessive absence may be cause for discharge. The handbook also contains a statement on discipline and disciplinary actions. Employees are advised of three forms of discipline: informal warning, formal warning, and suspension, layoff or discharge. The handbook lists some 37 "plant rules." A brief statement is made about dress standards. The handbook contains a section entitled "complaints and procedures," which lists the following steps for handling complaints or questions which may arise during the course of an employee's work:

> A. If anyone has a complaint or suggestion concerning his or her job or any other matter, it shall be taken up with his or her immediate supervisor.
>
> B. If the complaint or suggestion is not satisfactorily resolved by the immediate supervisor, the supervisor will arrange for the individual to talk with the foreman, who in turn will listen to the suggestion or complaint and attempt to work out a satisfactory solution.
>
> C. If the situation is still not satisfactorily resolved, the complaint or suggestion may be presented to the Personnel Director or General Manager.

The handbook contains a section on safety and safety suggestions which includes several directives regarding safety. Statements regarding promotional opportunities and employment practices, equal opportunity, lunch/break area, first aid facilities, and operation of company vehicles are also contained in the handbook.

Before Respondent distributed the handbook during March 1979, the only written rules in effect were contained in a three-page document. That document was posted on one occasion for a short period and employees were shown the document, but not given a copy, during their employment interview. The document included seven numbered statements on its first page. Those seven statements included a statement regarding the pay week

and payday; a directive that employees report changes in their addresses, phone numbers, tax information, etc. to Respondent; a directive that employees check the bulletin board; a directive regarding parking; a statement regarding wages; a directive that employees were to give notice if they plan to leave early or be absent which included a requirement that 3 days' absence necessitated a doctor's excuse or an excuse from the office that caused the absence on penalty of termination; and a requirement that notice be given and the employee clock out if he had to leave during the workday. The first page also contained statements regarding reporting injuries during work hours, and an indication that refreshment machines, other than the water fountain, were not to be used during working hours.[4]

The second page[5] contains statements that layoffs and call backs will be done by seniority, an explanation of the employees' medical insurance, two statements regarding dress and shoes, a statement regarding phone calls, an explanation of the shifts and breaktimes, a statement regarding vacations, and a statement regarding medical leaves. Additionally, the third from last statement on page 2 is as follows:

> If you are unsure about either the job that has been assigned to you or any company safety policy, please ask a supervisor. We would prefer to be interruptcd [sic] than to have you hurt.

The last page of the pre-March 1979 document is as follows:

> Notice to Employees
>
> Due to the increased number of employees, it has become necessary to establish working guidelines for those areas which are creating disturbances in our normal business operation.
>
> The trouble areas are specifically:
>
> 1. Lost time due to absence from work.
> 2. Telephone calls and visitations from non-employees.
>
> In an effort to reduce or eliminate these disturbances, we have established the following list of offenses.
>
> 1. All absences will be considered unexcused unless accompanied with a documents note.
> 2. Two late arrivals will constitute an offense.
> 3. Two incoming telephone calls will constitute an offense.
> 4. Any visit (other than at break or lunch) will constitute an offense.
>
> Effective immediately three offenses within a thirty day period will result in a warning slip to the offender.
>
> Two warning slips within a year is all that is allowed. The third issuance will be a termination notice.
>
> Gary E. Carmichael
> Manager

The March 1979 employee handbook was distributed to unit employees without notice to or bargaining with the Union.

G. *The New Insurance Carrier*

On April 1, 1979, Respondent changed its employees' medical and life insurance from a policy with Prudential Insurance Company to a policy with American Security Life Insurance Company. The evidence demonstrated that the change was necessitated in order to provide maternity benefits to the employees. Respondent felt the change was necessitated by government regulations requiring that maternity should be covered as any other illness. No evidence was introduced showing that any employee has actually suffered harm as the result of this change in carriers. Respondent did not offer to bargain regarding the change in insurance.

II. CONCLUSIONS

"Absent compelling economic considerations for doing so, an employer acts at its peril in making changes in terms and conditions of employment during the period that objections to an election are pending and the final determination has not been made." *Mike O'Connor Chevrolet-Buick-GMC Co., Inc., and Pat O'Connor Chevrolet-Buick-GMC Co., Inc.*, 209 NLRB 701, 703 (1974).[6]

The above rule is applicable in this case.[7]

The Board, in *Rust Craft Broadcasting of New York, Inc.*, 225 NLRB 327 (1976), held that the unilateral change must represent a "material, substantial and a significant change" from prior practice in order to be illegal.

The law remains clear that Respondent had a post-election and precertification obligation to bargain before engaging in unilateral changes in working conditions.[8]

A. *The Layoffs*

The evidence is not in dispute that Respondent on several occasions laid off a substantial number of employees

[4] These last two statements may have been numbered as well as the seven mentioned before. However, the margin on the file copy which I have was cut near the body of the statement and I could not detect any numbers beyond seven. In any event, I do not find the numbering or lack of numbering to be significant.

[5] Page 2 appeared to contain unnumbered statements. However, the file copy of that page was cut so that the left-hand margin was removed. I do not find the numbering or lack thereof to be of significance.

[6] See *Allis-Chalmers Corp.*, 234 NLRB 350 (1978).

[7] Respondent contended in its brief that its actions were permissible under *Howard Plating Industries, Inc.*, 230 NLRB 178 (1977). *Howard Plating* involved a simple refusal to commence contract negotiations during the pendency of election objections. The Board, in *Howard Plating* while discussing the case of *Laney & Duke Storage Warehouse Co., Inc., and Laney & Duke Terminal Warehouse Co., Inc.*, 151 NLRB 248 (1965), distinguished *Howard Plating* from an instance involving unilateral changes. Therefore, I find that the rule of *Howard Plating* is not applicable in the instant situation.

[8] *Florida Steel Corporation*, 235 NLRB 1010 (1978).

without affording the Union an opportunity to bargain.[9] Respondent contends that all those layoffs were economically motivated and that the layoffs were conducted on the basis of past practice.

Respondent's economic argument will be considered further under the section dealing with the remedy, *infra*. However, Respondent is not relieved of its obligation to avoid unilateral change without bargaining, on a showing that its actions were precipitated by economic factors.

The record supports Respondent's contention that the layoffs were economically justified and I so find. As indicated above, Plant Manager Carmichael testified that all the layoffs were caused by one or more of three economic factors. The General Counsel argued in his brief that Carmichael's testimony is insufficient to support its economic defense. I disagree. There was no evidence offered by the General Counsel to rebut Carmichael's assertions. The General Counsel's contention that Respondent's failure to submit additional economic evidence justifies a finding that economic reasons were insufficient is meritless. Even though I specifically find that Carmichael's testimony was sufficient, I also note that the General Counsel mentioned on the record that he did not anticipate seeking a make-whole remedy on the layoffs. The General Counsel did reserve the right to reevaluate his position on seeking a make whole remedy, but his comments clearly implied a belief that the evidence supported an economic defense to the layoffs. Under those circumstances, I will draw no adverse inference from Respondent's failure to introduce additional evidence of economic defense.

Nevertheless, economic justification does not resolve the problem. Obviously, the several issues inherent in a layoff situation are subject to discussion without injury to Respondent's economic position. The issues of employee selection and the order of their selection for layoff and recall are among those customarily considered in negotiations regarding layoffs. Respondent argues that as to those issues it simply followed past practice and did not engage in unilateral change. The Board has rejected that argument. See *Kal-Equip Company*, 237 NLRB 1234 (1978).

The layoff situations which arose following the 1977 election did not give rise to a continuation of the *status quo ante* by applying old layoff procedures. Respondent admitted that the layoffs resulted from as many as three different reasons. Additionally, although Respondent contended its past practice was to layoff and recall by seniority, the evidence demonstrated some confusion among Respondent's responsible supervisors as to whether seniority was applied on a job basis or otherwise. Therefore, I find that Respondent was obligated to offer to bargain regarding each of its layoffs which occurred after October 21, 1977, and before June 29, 1979. By failing to satisfy that obligation, Respondent violated Section 8(a)(5) of the Act.

B. *The Day Off, the Job-Bidding System, the Effects of Plant Expansion, and the New Insurance Carrier*

All of the above issues involved a substantial number of employees and all involved changes in conditions of employment. The day off incident may have involved as many as 20 percent of Respondent's entire work force volunteering to take the day off without pay. Although the job postings involved only two positions, it is apparent that a substantial number of employees were eligible for those two positions. In the case of plant expansion, new employees were hired and several employees were transferred. The new insurance policy apparently applied to all the unit employees.

There is not showing that any of the above events did not involve a change in working conditions. In view of Respondent's admitted failure to offer to bargain over those occurrences, I find that Respondent violated Section 8(a)(5).

C. *The Changed Production Rates*

Bargaining unit employees, especially those in "hand work," may, during the course of their work perform several different jobs. Each of those jobs has an assigned production rate. As explained above, the production rate on a particular job may be either an estimated rate or an actual rate. An employee's pay is not affected by his achieving or failing to achieve the production rate on any of his jobs. However, he may be disciplined if he fails to achieve at least 90-percent production on jobs having an assigned actual production rate. Employees are not disciplined because of failure to achieve production on jobs with estimated production rates.

During the period following the 1977 election, Respondent continued in its efforts to assign actual production rates to all its 1,000 to 1,500 jobs. Respondent admitted that in most of those instances the actual rate was higher than the earlier estimated rate on the particular job. As a consequence, employees that were not subject to discipline before the October 1977 election were subjected to possible discipline after an actual rate was assigned to their jobs. Employees were in fact disciplined because they failed to achieve the required production on actual rate jobs and at least one employee, Christina Lamas, was discharged following receipt of a third "warning slip" for low production.

The assignment of actual rates required independent study of each job. By failing to bargain over the actual rate assignments after October 21, 1977, Respondent engaged in unilateral changes over a subject that will eventually effect all the employees in the bargaining unit. I find Respondent's actions in that regard violate Section 8(a)(5). See *Kal-Equip Company, supra*.

D. *The New Employee Rule Book*

I find in agreement with the General Counsel that the new employee handbook represents a material, substan-

[9] Contrary to the contention of the General Counsel, I find that the layoffs which occurred after the certification were not unilateral. On June 29, 1979, Respondent notified the Union of its agreement to commence bargaining. On July 12, 1979, Respondent wrote the Union concerning its plan to lay off approximately 25 employees on July 20, 1979, due to a cutback in orders. Respondent indicated a willingness to discuss the proposed layoffs at the Union's convenience. Under those facts, and in the absence of any evidence showing unilateral changes after certification, I find that the record does not support a finding of a violation following Respondent's June 29, 1979, letter to the Union.

tial, and significant change from Respondent's prior practice.[10]

The handbook contained plant rules which were not contained in the existing written document and, in other areas, it made existing rules more restrictive. The handbook contained an absentee and tardy policy which was more onerous than the one contained in the earlier written rules. The new handbook contained a specific employee grievance procedure whereas the prior rules only mentioned a procedure for asking about job assignments or safety matters. The handbook disciplinary section is more detailed and onerous than anything contained in the prior rules.[11] Therefore, I find that the evidence is clear that the handbook constitutes a unilateral change in working conditions and I so find.[12]

CONCLUSIONS OF LAW

1. Respondent, Clements Wire & Manufacturing Company, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. International Union of Electrical, Radio and Machine Workers, AFL-CIO-CLC, and its Local 779, are labor organizations within the meaning of Section 2(5) of the Act.

3. All production and maintenance employees employed by Respondent at its Biloxi, Mississippi, facility, including material handlers, maintenance employees, floor inspectors, plant clerical employees and warehouse employees; excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. Since October 21, 1977, the above-mentioned labor organizations have been and are now the exclusive bargaining representative of all the employees in the aforesaid appropriate unit for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

5. By unilaterally laying off its employees, requiring its employees to volunteer to take a day off without pay, instituting a new job-bidding procedure, transferring employees and hiring new employees due to plant expansion, changing production rates, putting into effect a new employee handbook, and changing its insurance carrier and policies, without notice to, or consultation with, the above-named labor organizations, Respondent has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(5) of the Act.

THE REMEDY

Having found that Respondent has engaged in unfair labor practices in violation of Section 8(a)(1) and (5) of the Act, I shall recommend that it be ordered to cease and desist therefrom and to take appropriate action designed to effectuate the policies of the Act.

I recommend restoration of the *status quo ante* at the Union's request, as to certain of the unilateral changes which I have heretofore found violative. I recommend that the employee handbook which was distributed in March 1979 be rescinded in its entirety. I recommend that the procedure of posting notices for positions which was instituted in February 1978 be rescinded. I recommend that the actual production rates instituted between October 21, 1977, and June 29, 1979, be rescinded. I do not recommend restoration of the status quo of the insurance policy and carrier existing prior to April 1, 1979. The evidence reflects that the change in insurance carriers worked to the benefit of the employees. However, Respondent is obligated to bargain about the continued benefits and of her factors involved in continuing the present policy.

I further recommend that any disciplinary action imposed against employees in the bargaining unit resulting from Respondent's unilaterally instituting its employee handbook and actual production rates should henceforth be disregarded, rescinded, and stricken from Respondent's records. To the extent those disciplinary actions included suspensions, layoffs, or terminations, I recommend that Respondent be ordered to immediately and fully reinstate each such employee to the employee's former position, or, if that position no longer exists, to a substantially equivalent position, without prejudice to the employee's seniority or other rights and privileges. I shall recommend that Respondent be ordered to make those employees whole for any loss of earnings the employees may have suffered as a result of Respondent's illegal action. Backpay shall be computed with interest as perscribed in *F.W. Woolworth Company*, 90 NLRB 289 (1950), and *Florida Steel Corporation*, 231 NLRB 651 (1977).[13]

I do not find an order requiring a make-whole remedy to the employees laid off at various times between October 21, 1977, and June 29, 1979, to be appropriate. The evidence failed to show that Respondent's failure to bargain caused or contributed to the layoffs. In *Amoco Chemicals Corporation*, 237 NLRB 394 (1979), the Board, in accepting a remand from the United States Fifth Circuit, decided in accordance with the circuit court's mandate that a backpay award was unjustified in view of the failure of the evidence to demonstrate that the employees suffered any economic loss as a result of Amoco's failure to consult the Union before acting. Here, as in *Amoco*, the evidence fails to demonstrate that but for Respondent's failure to bargain over the layoffs, the employees would not have suffered economic loss. Moreover, the cases cited by the General Counsel in support of his plea for a make-whole remedy must be distinguished from the instant case. The Board has consistently applied backpay relief only in extraordinary situations where Respondent's illegal actions justified such an award. In the instant case no facts were established which would demonstrate

[10] *Boland Marine and Manufacturing Company, Inc.*, 225 NLRB 824 (1976).

[11] The above differences between the handbook and the earlier written rules are mentioned as illustrating a unilateral change and are not intended to be exhaustive or to limit the remedy recommended herein. I find the entire handbook constitutes a unilateral change.

[12] Although G.C. Exh. 9 represents written rules which existed prior to October 21, 1979, the testimony of Plant Manager Carmichael presented a question as to whether p. 3 of that document was ever implemented. If that question presents an issue regarding the remedy, evidence on that issue should be developed in compliance proceedings.

[13] See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

that the layoffs could have been avoided or mitigated through bargaining.

[Recommended Order omitted from publication.]